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To: Microsoft ATR
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Subject: Microsoft Settlement

Please accept the attached public comments in the case of United States of America vs. Microsoft Corporation.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, vs. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (CKK)

MICROSOFT SETTLEMENT COMMENTS SUBMITTED BY

The Telecommunications Research & Action Center
National Black Chamber of Commerce
National Native American Chamber of Commerce

January 28, 2002

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I. INTRODUCTION

The Tunney Act (Antitrust Procedures and Penalties Act, 15 U.S.C. § 16) requires the United States District Court for the District of Columbia (Court) to hear comments to determine whether or not an antitrust settlement was reached in the public interest. In the case of the *United States of America v. Microsoft Corporation* (Microsoft), the undersigned individuals and organizations all agree that without significant modification, the Microsoft-U.S. Department of Justice settlement (*proposed Final Judgement, November 6, 2001*) is far too weak to restore competition to the software industry and, thereby, bring the benefits of such competition to consumers. Therefore, without additional provisions, such as those proposed by the nine state Attorneys' General and Corporation Counsel who are pursuing further litigation, the settlement is decidedly *not* in the public interest.

II. STATEMENTS OF INTEREST

The Telecommunications Research & Action Center, is a non-profit, tax-exempt, membership organization based in Washington, D.C. Its primary goal is to promote the interests of residential telecommunications customers by helping them make informed decisions regarding telephone services. However, given the recent convergence of telecommunications, Internet, and other high technology products and services, TRAC is also concerned with consumers' welfare as it is affected by applications, including computer software, which will shape communications in the 21st Century. TRAC is governed by a Board of Directors. Its funding is primarily (95%) from member contributions and the sales of its publications. TRAC is not affiliated with any corporation and does not accept revenues, other than from the sale of its publications, from industry sources.

A nonprofit, nonpartisan, nonsectarian organization, the National Black Chamber of Commerce (NBCC) is dedicated to economically empowering and sustaining African American communities through entrepreneurship and capitalistic activity within the United States and via interaction with the Black Diaspora. The NBCC represents 64,000 Black owned businesses and provides an advocacy that reaches all 640,000 Black owned businesses. The businesses that the NBCC represents are both consumers of computer software and competitors in a market that has been shaped and dominated by the Microsoft Corporation. The NBCC joins these comments today in an effort to restore competition to this vital economic sector.

The National Native American Chamber of Commerce (NNACC) is organized to provide a coordinating forum to service Native American business, government, and civic organizations for community development. The efforts of the Chamber are also to provide services and benefits to Native Americans to assist them in competing in business and in government. The nationwide businesses that are members of the NNACC already face enormous challenges in competing in the New Economy. Monopolistic players such as Microsoft, who also engage in illegal business practices, make these efforts at competition nearly impossible. Accordingly, we join in offering these comments to the Court.

III. SUMMARY OF ARGUMENT

The proposed U.S. Department of Justice settlement contains inadequate enforcement provisions to protect consumers from Microsoft's monopolistic overpricing in the software market. Accordingly, the Court should adopt the more stringent settlements as proposed by the nine states Attorneys' General and Corporation Counsel from the District of Columbia.

A. Microsoft as Monopoly

As a monopoly in the software market, Microsoft produces more than 90% of all of the software operating systems in personal computers (PCs) and approximately 90% of all of the software suites (including Internet browsers, word processing, spreadsheet, and presentation programs) used with those operating systems. From the beginning of this case, the Court has rejected Microsoft's defense that the nature of the software market in which it competes naturally leads to the dominance of one player. As one consumer advocate has noted, "If a monopoly were really the natural state of affairs in this market, then Microsoft would not have had to engage in so many unnatural acts to preserve it."[1]

The unanimous decision of the United States Court of Appeals for the District of Columbia affirmed that Microsoft has used its leverage to repeatedly engage in anticompetitive behavior and, in the process, has committed numerous violations of antitrust law. According to the Competitive Impact Statement issued by the U.S. Department of Justice, the Court of Appeals found that Microsoft:

> (1) undertook a variety of restrictions on personal computer Original Equipment Manufacturers ("OEMs"); (2) integrated its Web browser into Windows in a non-removable way while excluding rivals; (3) engaged in restrictive and exclusionary dealings with Internet Access Providers, Independent Software Vendors and Apple Computer; and (4) attempted to mislead and threaten software developers in order to contain and subvert Java middleware technologies that threatened Microsoft's operating system monopoly.

As a result of Microsoft's actions, not only have consumers suffered from the immediate effects of higher prices for the company's software products and the continuous cycle of upgrades

[1] Statement of Dr. Mark N. Cooper on "The Microsoft Settlement: A Look to the Future," Before the Committee on the Judiciary, United States Senate, December 12, 2001.

required for their systems to function properly, they have also been adversely affected by the decline of choice, quality and innovation in the marketplace.

1. The Damage to Consumers

An *amicus* brief filed with the Court in 1999 estimated that monopoly overpricing by Microsoft has cost consumers an estimated $25 to $30 billion.[2] Other estimates put this figure at $10 to $20 billion.[3] In either case, the high and steadily increasing prices of Microsoft's products stand in stark contrast to those of personal computer systems and hardware, which as a result of fierce competition have plummeted in recent years. To some extent, Microsoft's strategy of bundling its products and the overall reduction in new computer system prices have also hidden these high prices from consumers.

The full cost of Microsoft's anti-competitive actions in squeezing out competing operating systems, Internet browsers, word processing, spreadsheet, and presentation applications from the marketplace is difficult to quantify. It is impossible to calculate how, without Microsoft's illegal business practices, competing products might have forced down software prices or brought new innovations to consumers. Such applications might have offered consumers additional choice on how they wished to equip and configure their computers. This *de facto* homogenization of the PC by Microsoft has led to other problems such as the acceleration of the spreading of viruses. For example, if one computer becomes infected, many become infected, as they share the same programming code with identical loopholes.

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[2] Remedies Brief of Amici Curiae, United States v. Microsoft, 84 F. Supp. 2d 9 (D.D.C. 1999) (Nos. CIV. A. 98-1232, 98-1233).

[3] Mark Cooper, "Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case," pp. 847-851, Cooper Hastings Law Review, 200106, November 27, 2001.

Microsoft is now pursuing online applications in banking, news, travel, advertising and other areas. Of paramount concern is the fear that Microsoft will use its Internet browser and these applications to dominate the online business world in the same manner as it leveraged its operating system to control the PC desktop. This cannot be allowed to happen. The success of the Internet and those who do business on it depends largely upon freedom of access through a multitude of competitive applications. Such a vision would not likely be realized were Microsoft to become the Internet's sole gatekeeper.

B. An Inadequate Settlement

In their Proposed Final Judgement, the Court of Appeals recognized Microsoft's culpability and rightly called for "prompt, certain and effective" remedies for consumers. The Court is specific in describing these provisions. Among them are requirements that computer manufacturers have the freedom to make "middleware" decisions regarding what software they choose to offer to consumers as standard on their machines. Manufacturers are to be able to sell and promote Microsoft and non-Microsoft products equally, and customize their systems and software as they choose, with licensing agreements to reflect this and without fear of retaliation. The Proposed Final Judgement also frees other software and hardware developers to work on applications for the Windows platform, and requires Microsoft to disclose the technical information needed for them to do so.

Consumers would no doubt benefit from the decrease in price and increase in choice in the software market if the U.S. Department of Justice settlement with Microsoft supported, *and*

made enforceable, all of the Judgement's provisions. Unfortunately, the settlement falls short of this goal, as it contains many loopholes. For example, while Microsoft is required to share technical information to ensure compatibility with other companies' software, it has no obligation to do so if *Microsoft* determines that the disclosure would compromise security or damage licensing agreements. Microsoft, alone, should not be given the right to make this determination.

The Court of Appeals found Microsoft's "commingling of code," the process by which Microsoft inextricably links the programming of its other applications to Windows and effectively "locks out" competitors, to be illegal. Yet, the proposed settlement conspicuously omits mention of an enforceable remedy. The settlement also gives Microsoft the power to unilaterally determine what is defined as a "Window Operating System product." Based on its previous behavior, Microsoft is likely to have an inclusive definition. The company now dominates the Internet browser market, as its Internet Explorer application has become an integral part of the Microsoft operating system.

In yet another example of how consumers gain little from the settlement, Microsoft is also granted a loophole through which it can continue to pay other vendors when "reasonably necessary" *not* to develop or distribute competing products. As a result, innovation will continue to be stifled and consumers will not see or be able to choose products that Microsoft has paid to keep off of store shelves. Rather than fostering an environment that encourages entrepreneurship, growth and healthy business competition, the settlement will reinforce Microsoft's dominant role in the industry.

C. Additional Remedies Needed

In an attempt to address the settlement's shortcomings, nine states and the District of Columbia have offered remedial proposals. These proposals are now consumers' last chance at true reform in this case. Unlike those included in the settlement, the proposals will, if enacted, contribute to reduced software prices and ensure that consumers are at minimum given the option of making choices when equipping their computers. Specific proposed remedies would require Microsoft to:

- Offer a stripped-down, unbundled version of Windows. Without built-in software such as the Internet browser, media player, or email applications, consumers will be able to better custom order PCs with only the installed applications which they choose to purchase.
- Share its code for its Internet browser with other software developers, thereby allowing for new products with new innovations and ensuring that consumers do not rely on Microsoft as the predominant way to the Internet.
- Auction the right to create different versions of its Office software suite for use on other operating systems, such as Linux. Again, this provision eliminates Microsoft's application barrier to entry and gives more choice to consumers.
- Include "middleware" software in Microsoft's latest operation system, Windows XP. This will enable software applications to universally, across non-Microsoft platforms, expanding interoperability of products and consumer options.

Consumers also support the nine Attorneys' General and Corporation Counsel's efforts to advocate for a court-appointed master with real enforcement abilities. The U.S. Department of Justice settlement proposed a three-person technical committee to oversee Microsoft's compliance with the settlement. The findings of this committee would neither be made public nor revealed to the Court. In contrast, a court-appointed master would be able to more effectively respond if Microsoft violates the terms of the settlement.

Finally, the settlement offers no effective punishment to deter Microsoft from acting in bad faith. As it stands, the penalty for non-compliance with the agreement is only an extension of the monitoring period. The litigating states have proposed an alternative punishment with far greater consequences: the revealing of Windows' source code.

Together, these steps are needed to effectively oversee and enforce any agreement with Microsoft, a company that has leveraged its dominance in the market to get what it wants at the expense of its competitors and consumers.

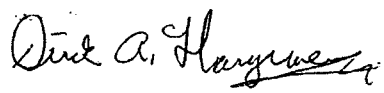
V. CONCLUSION

The proposed U.S. Department of Justice settlement alone does not remedy or address the finding of the Court of Appeals. It is not complete in its breadth, nor does it contain adequate enforcement provisions. For millions of consumers who rely upon a personal computer in so many facets of their lives, this agreement, as it stands, is decidedly *not* in the public interest. It will *not* make Microsoft's products more affordable or reliable. It will *not* give consumers greater choice of what software they wish to run or flexibility as to how they wish to configure it. It will *not* encourage innovation and competition in the software industry and allow consumers to reap the benefits.

Many on both sides of this case have complained about the length of the trial and the settlement process. An effective solution now appears to be within reach. We urge the Court not to allow a settlement that does not live up to the Judgment of the Court of Appeals and settle for settlement's sake. We urge that the Court consider and adopt the proposals put forth by the

litigating states and the District of Columbia as a much more thorough and enforceable solution, one that will bring all of the above benefits to consumers who represent the public interest.

Respectfully Submitted,



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